

**FILE COPY**

APR 5 1949

**SUPREME COURT OF THE UNITED STATES**

CHARLES BLANDE WOFFLEY  
CLERK

**OCTOBER TERM, 1948**

---

**No. 696**

---

**DAWN L. ALLEN,**

*Petitioner,*

*vs.*

---

**WILLIAM STANLEY LITSINGER AND ELIZABETH  
KNAPP LITSINGER,**

*Respondents*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF APPEALS OF THE STATE OF  
VIRGINIA AND BRIEF IN SUPPORT THEREOF.**

---

**CHARLES ORLANDO PRATT,**  
*Washington, D. C.;*

**JOHN ALVIN CROGHAN,**  
*Washington, D. C.,*  
*Attorneys for Plaintiff.*

April, 1949.



## INDEX

Opinions below .....	Page 1
Jurisdictional statement .....	2
Questions presented .....	4
Statute involved .....	5
Statement of the case .....	5
Specification of errors to be urged .....	11
Reasons for granting the writ .....	12
Conclusion .....	52
Appendix .....	55

## CITATIONS

### Table of Cases:

<i>Almquist v. Garner</i> , 200 P. 76, 53 Cal. App. 305 ..	38
<i>In re Anderson</i> (1933), 189 Minn. 85, 248 N. W. 657 .....	26, 33
<i>Andrews Adoption</i> , 14 Pa. Dist. & Co. 343 .....	26
<i>Ballard v. Hunter</i> , 209 U. S. 291 .....	46
<i>Bell v. Krauss</i> , 146 P. 874, 169 Cal. 387 .....	38
<i>In re Brand's Estate</i> , 95 So. 603, 153 La. 195 .....	38
<i>Brinkerhoff-Faris Co. v. Hill</i> , 281 U. S. 673, 680-682, 74 L. Ed. 1112, 50 S. Ct. 454 .....	3
<i>Brown v. Mississippi</i> , 207 U. S. 278, 55 S. Ct. 461, 80 L. Ed. 682 .....	46
<i>In re Bruce</i> , 53 N.Y.S. (2) 502 (1945) .....	27
<i>In re Burke's Adoption</i> , 60 N.Y.S. (2) 421 (1946) .....	26
<i>Butler v. Collins</i> , 12 Cal. 457, 463 .....	21
<i>In re Capparelli's Adoption</i> , 175 P. (2) 153 (Ore., 1946) .....	29, 32, 33
<i>Coombes v. Getz</i> , 285 U. S. 434, 441 .....	46
<i>Cowen v. Paddock</i> , 17 N.Y. Sup. 387 .....	21
<i>In re Cozza</i> , 163 Cal. 514, 126 P. 161 .....	34, 35
<i>In re De Leon</i> , 232 P. 738, 70 Cal. App. 1 .....	38
<i>Farrell v. Wilton</i> (1893), 3 Terr. L. R. 232 .....	39
<i>In re Force</i> , 193 P. 698, 113 Wash. 151 .....	38
<i>Furgeson v. Jones</i> , 17 Ore. 204, 217, 218 (1889) ..	34, 39

	Page
<i>Application of Graham</i> (Mo. App. 1946), 199 S. W. (2d) 68	33
<i>Grannis v. Ordean</i> , 234 U. S. 385, 394, 58 L. Ed. 1639, 34 S. Ct. 783	46
<i>Green v. Paul</i> , 31 So. (2) 819 (La. 1947) . . . 29, 30, 33, 34	3
<i>Grignon's Lessee v. Astor</i> , 43 U. S. 319	31
<i>Hammond v. Chadwick</i> , 199 S. W. (2) 547 (Texas, 1946)	26
<i>Hebhardt v. Anderson</i> , 7 Pa. Dist. & Co. 139	47
<i>Huntington v. Attrill</i> , 146 U. S. 657, 683, 684	46
<i>Hollins v. Oklahoma</i> , 295 U. S. 294, 55 S. Ct. 784, 79 L. Ed. 1500	21, 32
<i>In re Hollyman</i> , 172 L.T.R. 200, 1 A.F.R. 290, C. A.	3
<i>International Shoe Company v. Washington</i> , 326 U. S. 310, 319, 66 S. Ct. 160, 90 L. Ed. 104	46
<i>Jacob v. Roberts</i> , 223 U. S. 261	38
<i>Johnson v. Johnson</i> , 264 P. 842, 124 Ore. 480	20
<i>Ex parte Knee</i> , 1 Bos. & Pull. N. R. 148	38
<i>In re Knott</i> , 197 S. W. 1097, 138 Tenn. 349	35
<i>Long v. Dufut</i> , 58 Ore. 162, 112 P. 59	46
<i>Mansfield, C. &amp; L. M. R. Co. v. Swan</i> , 111 U. S. 379, 382, 28 L. Ed. 462	38
<i>In re McCann's Adoption</i> , 159 A. 334, 1014 Pa. Super. 196	33
<i>In re McDonnell's Adoption</i> (1947), 176 P. (2d) 778	45
<i>Meyer v. Nebraska</i> , 262 U. S. 390	3
<i>Milwaukee County v. White Co.</i> , 296 U. S. 272, 60 L. Ed. 227	47
<i>Mobile &amp; Ohio R. R. v. Tennessee</i> , 153 U. S. 486, 492, 495	3
<i>National Licorice Co. v. Labor Board</i> , 309 U. S. 350, 362, 84 L. Ed. 809	26, 33, 34
<i>In re Nelms</i> , 279 P. 748, 153 Wash. 242 (1929)	3
<i>New Orleans Water Works v. New Orleans</i> , 164 U. S. 471-480, 31 L. Ed. 523, 17 S. Ct. 165	38
<i>In re Neuman</i> , 262 P. 1112, 88 Cal. App. 186	35
<i>Non-She-Po v. Wa-Win Ta</i> , 37 Ore. 213, 62 P. 15, 82 Am. St. Rep. 749	46
<i>Norris v. Alabama</i> , 294 U. S. 587	



	Page
<i>O'Brien v. The People</i> , 17 Cal. 561, 563.....	52
<i>Patterson v. Alabama</i> , 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082.....	46
<i>Pennoyer v. Neff</i> , 95 U. S. 714, 24 L. Ed. 565.....	43, 47
<i>People v. Feser</i> , 186 N.Y.S. 443.....	38
<i>People v. Tupper</i> , 122 Cal. 424.....	51
<i>State ex rel. Platzer v. Beardsley</i> (1921), 149 Minn. 435, 183 N. W. 956.....	33
<i>Powell v. Alabama</i> , 287 U. S. 45, 53 S. Ct. 55; 77 L. Ed. 153.....	46
<i>Queen v. Nash</i> (1883), 10 Q.B.D. 454.....	28
<i>Riverside Mills v. Menefee</i> , 237 U. S. 189, 193, 59 L. Ed. 912, 35 S. Ct. 980.....	3
<i>Scott v. McNeal</i> , 154 U. S. 34, 46, 38 L. Ed. 902, 4 S. Ct. 1112.....	44, 47
<i>In re Sharon's Estate</i> , 177 P. 283, 179 Cal. 447..	37
<i>Shelley v. Kraemer</i> , 334 U. S. 1, 16, 17.....	3
<i>Sinquesfeld v. Valentine</i> , 159 Miss. 144, 132 So. 81.....	44
<i>Skaggs v. Gannon</i> , 170 S. W. (2) 12 (Ky.).....	31
<i>Snyder v. Commonwealth of Mass.</i> , 291 U. S. 97, 53 Sup. Ct. 330, 78 L. Ed. 674.....	46
<i>State v. Beardsley</i> , 183 N. W. 956, 149 Minn. 435..	26
<i>State v. Benerman</i> , Sup. Ct. of Kansas (1898), 53 P. 874.....	52
<i>Stokes v. State</i> , 71 Ark. 112, 71 S. W. 248.....	50
<i>In re Sunada</i> , 31 Hawaii 328.....	26
<i>In re Symonds Adoption</i> , 44 Pa. Co. 209.....	38
<i>In re State ex rel. Towne et al. v. Superior Court for Kitsay Co.</i> , 165 P. (2) 862 (Wash., 1946) ..	26
<i>Truelove v. Parker</i> , 132 S. E. 295, 191 N. C. 430.....	37
<i>Twining v. State of New Jersey</i> , 211 U. S. 78, 110, 53 L. Ed. 111.....	3
<i>In re White's Adoption</i> , 1 N. W. (2) 579, 300 Mich. 378, 138 A.L.R. 1034.....	27, 31, 34
<i>Williams v. State</i> (Texas), 99 S. W. 1000.....	50
<i>Wright v. Fitzgibbons</i> , 21 So. (2) 709 (Miss., 1945).....	26, 34
<i>X v. Y</i> , 79 Que. S. Ct. 587.....	20

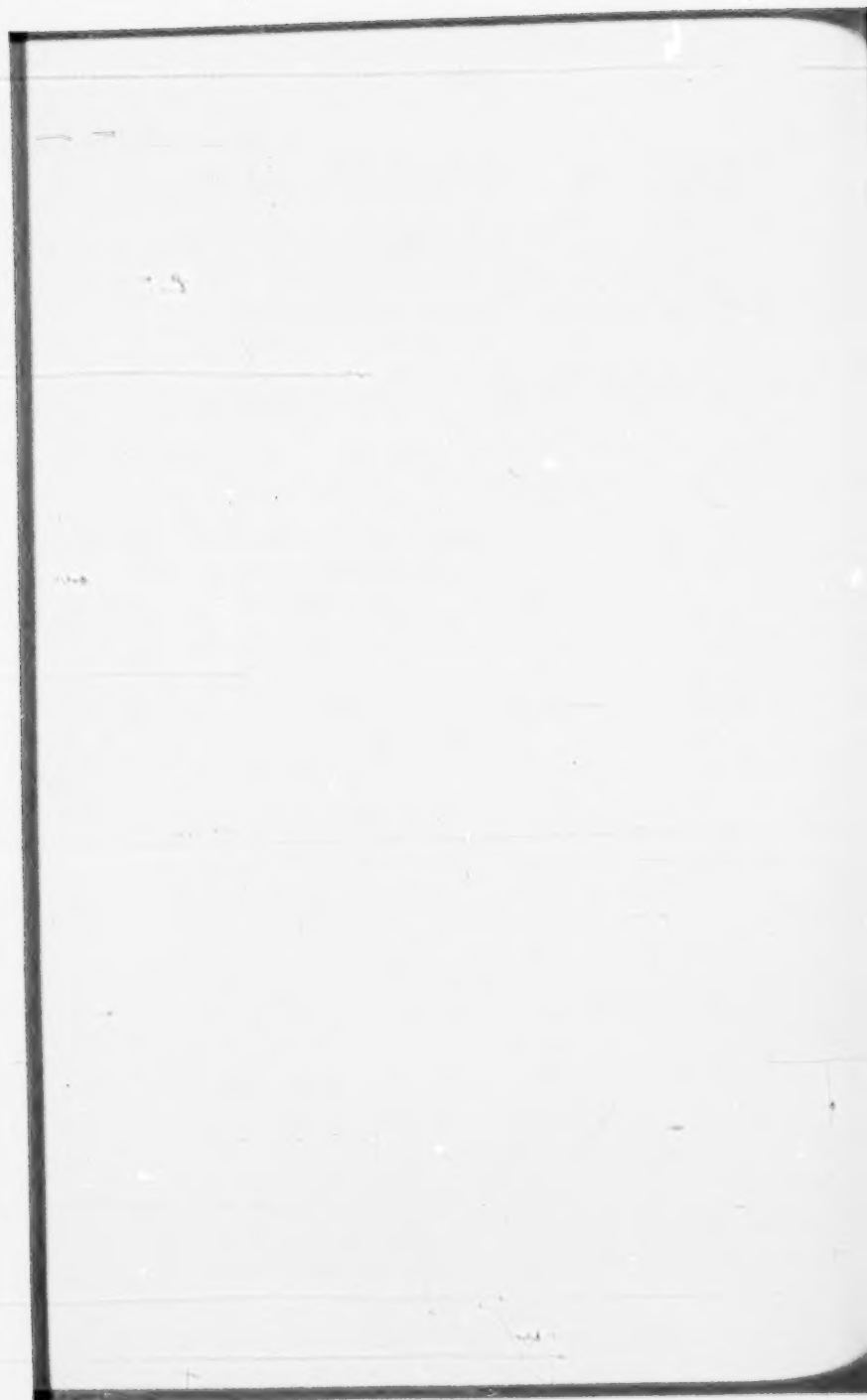
## Statutes:

	Page
"Adoption of Children Act," 16 and 17 George V, c. 29.....	20
United States Code Annotated, Vol. 28, Sect. 1257.....	2
Virginia Code of 1942, Annotated, (Michie), as amended:	
Section 5333 (c).....	49
Section 5333 (d).....	5, 8, 9, 24

## Miscellaneous:

1 Am. and Eng. Cyc. of Law (2d Ed.), p. 736....	37
American Jurisprudence:	
Vol. 1, pp. 639, 640.....	19
Vol. 1, sect. 37.1 .....	30, 37
American Law Institute, Code of Criminal Procedure (1931) .....	51
American Law Reports, 2nd Series:	
Vol. 2, p. 892 at n. 13.....	31
Vol. 2, p. 897.....	36, 39
Anderson's Dictionary of Law, p. 230.....	21
Bishop, "Criminal Procedure" (2nd Ed.), p. 267 .....	50
Black's Law Dictionary (2d Ed.), p. 249.....	21
Bouvier's Law Dictionary (1897), p. 400.....	21
Burdick, Charles T., "The Law of the American Constitution" (1922), p. 516.....	42
Cooley, "Constitutional Limitations" (8th Ed.), pp. 846-847.....	41
Corpus Juris Secundum:	
Vol. 2, p. 367.....	37
Vol. 2, p. 383.....	20
Vol. 2, p. 386.....	26
Vol. 2, p. 387.....	19
Vol. 16, pp. 1185-1186.....	51
1 Cyc. of Law and Procedure, p. 920.....	36

	Page
Halsbury's "Laws of England," 1935, V. 17, pp. 683, 684	32, 33
Heisterman, Carl A., "A Summary of Legislation on Adoption" in the "Social Service Review," Vol. IX, No. 2, June, 1935, p. 277	20
Hochheimer, Lewis, "Treatise on the Law Relating to the Custody of Infants" (1887), p. 196	19
"The Infant's Lawyer," London (1697), p. 233	34
Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States" (1936), p. 28	45
Rottshaeffer, "Constitutional Law," p. 855	41
Story, "Equity," Vol. 1, Sects. 222-223	21
Tyler, R. H., "Commentaries on the Law of Infancy," 2nd Ed. (1882), p. 288	19
Willis, "Constitutional Law" (1936), p. 676	42
Willoughby, "Constitutional Law of the United States," Vol. III (2d Ed.), p. 1709	42



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

---

**No.**

---

**DAWN L. ALLEN,**

*Petitioner,*

*vs.*

**WILLIAM STANLEY LITSINGER AND ELIZABETH  
KNAPP LITSINGER,**

*Respondents*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF APPEALS OF THE STATE OF  
VIRGINIA AND BRIEF IN SUPPORT THEREOF.**

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of the State of Virginia entered on November 16, 1948 (R. 290).

**Opinions Below**

The *per curiam* opinion of the Supreme Court of Appeals of Virginia, dated November 16, 1948 (R. 290), is unreported; likewise the opinion of the Circuit Court of Essex County, dated June 4, 1948 (R. 283), is unreported.

### Jurisdictional Statement

The judgment of the Supreme Court of Appeals of Virginia was entered on November 16, 1948 (R. 290). This Court by order dated February 9, 1949, extended the time for filing a petition for writ of certiorari until April 15, 1949.

The jurisdiction of this Court is invoked under Section 1256 (3) of the Judicial Code, as amended, 28 U. S. C. A. 1257, on the ground that the decision denied a title, right or privilege claimed by petitioner under the Federal Constitution.

Petitioner asserts that her alleged "consent" for the adoption of her child by strangers, given on March 18, 1947, was obtained by coercion and duress, and, therefore, was null and void.

Petitioner further contends that notwithstanding the legal invalidity of her consent given on March 18, 1947, to the adoption of her child by strangers, she, nevertheless, affirmatively undertook to withdraw such consent during the pendency of an interlocutory decree of adoption entered by the Circuit Court of Essex County, Virginia. In view thereof, petitioner asserts that no consent to the adoption existed at the time of the entry of a final decree of adoption by that court.

Petitioner alleges that since the consent obtained from her on March 18, 1947 to the adoption of her child by strangers was a legal nullity, and, further, in view of the fact that she nevertheless withdrew such colorable consent before entry of a final decree of adoption, that the Circuit Court of Essex County *was completely without jurisdiction over the subject matter of adoption* (Italics supplied).

Petitioner contends that, lacking such jurisdiction over the subject matter, the Circuit Court of Essex County violated procedural due process of law within the meaning



of the Fourteenth Amendment to the Federal Constitution in thereafter entering a final decree of adoption.

Petitioner further declares that she was denied due process of law within the contemplation of Amendment Fourteen of the Federal Constitution by the action of the judge of the Circuit Court of Essex County in willfully absenting himself from the bench and the court room while important evidence was being presented.

The cases relied on to sustain the jurisdiction of this Court on the question of whether the Circuit Court of Essex County had jurisdiction are:

- Pennoyer v. Neff*, 92 U. S. 714, 24 L. Ed. 565;  
*Grignon's Lessee v. Astor*, 43 U. S. 319;  
*International Shoe Company v. Washington*, 326 U. S. 310, 319, 66 S. Ct. 160, 90 L. Ed. 104;  
*Shelley v. Kraemer*, 334 U. S. 1, 16, 17;  
*Scott v. McNeal*, 154 U. S. 34, 46, 38 L. Ed. 902, 4 S. Ct. 1112;  
*New Orleans Water Works v. New Orleans*, 164 U. S. 471, 480, 31 L. Ed. 523, 17 S. Ct. 165;  
*Twining v. State of New Jersey*, 211 U. S. 78, 110, 53 L. Ed. 111, 295 S. Ct. 24;  
*Riverside Mills v. Menefee*, 237 U. S. 189, 193, 59 L. Ed. 912, 35 S. Ct. 980;  
*Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 680-682, 74 L. Ed. 1112, 50 S. Ct. 454;  
*Milwaukee County v. White Co.*, 296 U. S. 268, 272, 80 L. Ed. 227, 56 S. Ct. 233;  
*National Licorice Co. v. Labor Board*, 309 U. S. 350, 362, 84 L. Ed. 809, 605 S. Ct. 576.

The cases relied upon to establish violation of due process of law because of the absence of the trial judge from the bench during part of the trial are *Furgeson v. Jones*, 17 Ore. 204, 217; *Stokes v. State*, 71 Ark. 112, 71 S. W. 248; *Wil-*

*liams v. State* (Texas), 99 S. W. 1000; *State v. Benerman* (Kansas), 53 P. 874; *O'Brien v. The People*, 17 Cal. 561, 563; *People v. Tupper*, 122 Cal. 424.

Petitioner on February 21, 1948, filed a motion in the Circuit Court of Essex County to revoke the interlocutory order of adoption previously entered by that court on May 7, 1947 (R. 8).

Petitioner's motion to revoke the interlocutory order asserted that she was not competent, physically or mentally, to give the "consent" to adoption allegedly furnished and that such alleged "consent" did not represent her considered judgment or desire (R. 8).

In the Supreme Court of Appeals of Virginia petitioner asserted her objection to the jurisdiction of the Circuit Court of Essex County on the ground that there was no valid consent to the adoption and on the further ground that such colorable "consent" as may have been given was not a continuing consent but was withdrawn before the entry of a final decree of adoption.

The questions presented are of substance as is disclosed and more fully developed under reasons for granting the writ *infra*, p. 12 *et sequitur*.

### Questions Presented

1. Whether the alleged consent of a natural mother, obtained by duress, to the adoption of her infant by strangers vested the Circuit Court of Essex County, Virginia, with jurisdiction over the subject-matter of the adoption.

2. Whether the affirmative withdrawal of the alleged consent to adoption, obtained by duress, by a natural mother before entry of a final decree of adoption operated to deprive the Circuit Court of Essex County, Virginia, of its assumed jurisdiction over the subject-matter of the adoption.

3. Whether the Circuit Court of Essex County deprived the petitioner of due process of law within the meaning

of the Fourteenth Amendment to the Federal Constitution when, lacking jurisdiction over the subject-matter of the adoption, it proceeded to enter a final order of adoption,

4. Whether the Circuit Court of Essex County, Virginia, deprived the petitioner of due process of law within the contemplation of the Fourteenth Amendment when, during the presentation of important evidence, the judge of that court willfully absented himself from the bench and court room for a considerable period of time.

### **Statute Involved**

The only statute involved is the provision of the 1948 Cumulative Supplement to the Virginia Code of 1942 (Michie), as amended, relating to adoption. The pertinent section thereof is set out in the Appendix, *infra*.

### **Statement of the Case**

Your petitioner, Dawn L. Allen, a natural mother, seeks to recover her infant child now unlawfully held in the custody of its adoptive parents, William Stanley Litsinger and Elizabeth Knapp Litsinger, respondents in this case.

Your petitioner asserts, in general that in being deprived of her child by the courts of Virginia she has been denied due process of law.

The following relation of the facts and circumstances involved, it is submitted, lend support to the assertion thus advanced by petitioner.

Petitioner is a woman thirty-nine years of age. She was born in Texas and was brought up along with several brothers and sisters in a good Christian home and environment. She attended East Texas State Teachers College, receiving the degree of Bachelor of Science in 1940 (R. 73), and taught school in Texas for more than nine years (R. 75). During the latter period Miss Allen taught Sunday

School in the Christian Church of which her father was an elder (R. 75, 76).

In February, 1946, petitioner moved to Little Rock, Arkansas, where she accepted employment with the United States Government (R. 75, 77). There she met a Captain Moore, an Army officer, who became the father of her child (R. 77). Petitioner believed herself to be in love with Capt. Moore, and was intimate with him on two occasions (R. 78, 79). Previously petitioner had never been intimate with any one. Approximately two weeks before becoming aware of her pregnancy, petitioner and Capt. Moore had a disagreement. At that time Capt. Moore announced that he was not a divorced man, as he previously had represented himself to be, and that his wife had refused to grant him a divorce (R. 79).

When petitioner discovered that she was pregnant she nearly lost her mind (R. 79) and felt as though she "wanted to get away from everybody" (R. 79). Captain Moore having been ordered to Germany, Miss Allen left for Washington, D. C., arriving there on July 10, 1946 (R. 79, 80).

Subsequently, to wit, on July 31, 1946, in response to a newspaper advertisement, petitioner entered the employ and lived at the home of the Reverend Raymond Stanley Litsinger and his wife, Blanche Walker Litsinger, in Silver Spring, Maryland, as a practical nurse (R. 82, 83).

Prior to accepting employment in the Litsinger home petitioner had disclosed her pregnancy to Mrs. Blanche Walker Litsinger (R. 53, 59, 81). Notwithstanding her difficulty, petitioner was accepted in the Litsinger home as a practical nurse for Mrs. Litsinger's invalid sister, Mrs. Todd. There she remained, excluding the period of her hospital confinement, until May 24, 1947.

After petitioner had assumed her nursing duties in Reverend Litsinger's home, both Reverend and Mrs. Lit-

singer advanced the suggestion to petitioner that she authorize the adoption of her baby at birth by William Stanley Litsinger, nephew of the Reverend Litsinger and respondent herein, and his wife, Elizabeth Knapp Litsinger, respondent herein (R. 43, 54), both of Tappahannock, Virginia.

Petitioner reluctantly agreed to the proposed arrangement (R. 19, 54, 84).

On November 18, 1946, petitioner, under compulsion, signed an agreement (hereinafter referred to as the Agreement of November 18) by the terms of which petitioner sanctioned the adoption, upon birth, of her child by respondents.

This agreement of November 18 had been prepared in Tappahannock, Virginia, by Gordon Lewis, Esq., attorney for respondents, at the request of respondents (R. 89).

Prior to her execution of the said Agreement petitioner had no advice of counsel, close friends, or relatives (R. 87). When handed the agreement by Reverend and Mrs. Litsinger, petitioner read the first paragraph thereof (R. 87). Then, apparently overcome by emotion at the prospective loss of her child (R. 60, 86, 87), she read no further (R. 87). Upon the strong urging of Reverend Litsinger, however, petitioner signed the Agreement.

The record indisputably reveals that petitioner signed the Agreement of November 18, 1946, while in a state of emotional agitation and while being subjected to strong compulsion by Reverend Litsinger and his wife (R. 55, 87, 88).

After petitioner had signed the Agreement of November 18, 1946, Mrs. Blanche Walker Litsinger took possession of petitioner's copy thereof and never thereafter returned it to petitioner (R. 88).

While petitioner acknowledges that under the alleged Agreement of November 18 she knew she was authorizing

the adoption of her child by respondents, she nevertheless was not aware that she was "giving up" her baby (R. 122).

It is pertinent here to state that the alleged Agreement of November 18, 1946, whatever may be its legal effect, *was not the statutory consent required by the laws of Virginia.*<sup>1</sup> (Italics supplied).

The delivery of petitioner's baby on January 6, 1947, was effected under the obstetrical direction of Dr. Herman Diamant (R. 36).

Dr. Diamant in 1942 had succeeded to the practice of Dr. Vernon Litsinger, brother of Reverend Litsinger and father of respondent, William S. Litsinger (R. 43). Through the latter circumstance and association Dr. Diamant became friendly with respondents (R. 43).

Dr. Diamant's employment during petitioner's confinement was arranged by Mrs. Blanche Walker Litsinger who explained petitioner's predicament to him (R. 44). The doctor was aware that the respondents intended to adopt the child (R. 92).

The attending physician, Dr. Diamant, left instructions with hospital personnel that petitioner's child was not to be taken into the presence of its mother after birth. These instructions, issued without petitioner's knowledge or consent, were revoked following petitioner's strong protest (R. 92).

Petitioner left the hospital on January 12, 1947, unable to walk (R. 123), and returned to the home of Reverend Litsinger (R. 93). Some weeks thereafter petitioner was advised by Dr. Diamant, after consultation, to "go to a psychiatrist" because of the confused state of petitioner's mind (R. 48, 50). Subsequently, Dr. Diamant transmitted to respondents a report of his latterly mentioned advice (R. 50, 51).

---

<sup>1</sup> 1948 Cum. Supp. to the Virginia Code of 1942, Annotated (Michie), Sec. 5333(d).



Respondents took the baby from the hospital on January 13, 1947, and returned to Tappahannock (R. 209, 210). Neither respondent had ever seen petitioner prior to the day the baby was taken from the hospital (R. 209).

Respondent, Elizabeth Knapp Litsinger, testified that when she went to the hospital to take custody of petitioner's baby she was informed by Dr. Diamant that petitioner had stated to him that she did not know whether she wanted to give the baby up (R. 223). Respondent further testified that earlier "Uncle Stanley (meaning the Reverend Litsinger) did write a letter down here saying he didn't know how things were coming along up at that end, . . . ." (R. 222, 223, 225).

On February 17, 1947, respondents filed their petition for adoption of the baby, stating that petitioner had given her consent in writing to the adoption.

Petitioner denies that the Agreement of November 18, 1946, executed by petitioner under duress, was a consent to the adoption within the purview and objective of the Virginia statute appertaining to adoption. *1946 Cum. Supp. to the Virginia Code of 1942, Annotated, (Michie), Sec. 5333 (d)*. Otherwise, the consent filed on May 7, 1947, the procurement of which will immediately be described, would have been superfluous and meaningless.

Uncontradicted evidence shows clearly that petitioner had neither friends nor the benefit of legal counsel at this time. There was absolutely no one to whom she could turn except the Reverend Litsinger and his wife who, to say the least, were "working in the interest" of the respondents and who were emissaries actively supporting the adoption of petitioner's infant by respondent (R. 21, 22, 24, 25, 28, 29, 32, 33, 34, 35, 54, 55, 57, 59, 60, 66, 82, 88, 95, 96, 100, 124, 125, 127, 129, 136, 139, 140, 141, 240).

On March 4, 1947, there arrived at the home of the Reverend Litsinger a paper representing a form of statu-

tory consent to the pending adoption proceedings. Petitioner opposed the execution of this consent and resisted the continued influence, persuasion and coercion of the Reverend and Mrs. Litsinger until March 18, 1947 (R. 22, 24, 35, 60, 66, 95, 96, 100, 122). On that date petitioner, torn by emotional distress and overwhelmed by duress, signed the "consent". On May 7, 1947, this alleged consent was filed in the Circuit Court of Essex County.

It may be observed, in passing, that one of the assurances held out to petitioner as an inducement for the execution of the consent of March 18, 1947, was that there was no reason why petitioner might not see her baby following its adoption by respondents (R. 25, 26, 32, 88). Although petitioner was partially motivated by this assurance in signing the consent, the promise made to petitioner was never fulfilled.

On May 7, 1947, the Circuit Court of Essex County entered an interlocutory decree awarding custody of petitioner's baby to respondents for a period of one year and changing his name to William Stanley Litsinger, Jr. (R. 5-7).

Petitioner filed in the Circuit of Essex County on February 21, 1948, timely notice and petition asking the court to revoke the interlocutory order previously entered and to enter an order directing respondents to deliver the custody of the child to petitioner (R. 7, 8). It should be emphasized that petitioner's notice and motion were filed during the pendency of the interlocutory decree and before entry of a final decree of adoption.

On May 14, 1948, Arthur W. James, Virginia Commissioner of Public Welfare, filed his final report in the then instant proceedings (R. 9-12). *This report concluded without definite recommendation in the case.* (Italics supplied.)

After a hearing on June 4, 1948, the Circuit Court of

Essex County dismissed the petition and entered a final order confirming the interlocutory decree of adoption.

During this hearing, it is imperative to note, the judge of that court absented himself from the bench and the court room for a considerable period of time during the reception of testimony favorable to petitioner. This misconduct of the judge, petitioner alleges, deprived her of procedural due process of law.

To this order petitioner duly objected and excepted and appealed to the Virginia Supreme Court of Appeals.

On the 16th day of November, 1948, the Supreme Court of Appeals *per curiam* rejected the petition and refused petitioner's appeal, thereby affirming the decree of the Circuit Court of Essex County.

Faced with the permanent separation from her baby induced by means she conceives to be unlawful, petitioner now prays for a writ of certiorari on the general ground that she has been denied due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

### **Specification of Errors to Be Urged**

The Supreme Court of Appeals of Virginia erred:

1. In not holding that the Circuit Court of Essex County was without jurisdiction over the subject-matter of the adoption since the consent of the petitioner, the natural mother of the child, was obtained by duress and coercion.

2. In not holding that the Circuit Court of Essex County was without jurisdiction over the subject matter of the adoption, since petitioner, the natural mother of the child, withdrew her alleged "consent" to the adoption, obtained by duress and coercion, during the pendency of an interlocutory decree for adoption and before entry of a final decree of adoption.

3. In not holding that the Circuit Court of Essex County deprived the petitioner, the natural mother of the child, of due process of law by denying petitioner the right, during the pendency of an interlocutory decree and before entry of a final decree of adoption to withdraw her alleged "consent" to the adoption obtained by duress and coercion.

4. In not holding that petitioner was denied due process of law by the action of the judge of the Circuit Court of Essex County in absenting himself from the bench and from the court room for a considerable period of time while important evidence was being presented.

### **Reasons for Granting the Writ**

#### **I**

**Petitioner's alleged consent to the adoption of her child by the respondents was obtained by duress and therefore was null and void.**

*1. The Coercive Efforts Of Reverend And Mrs. Litsinger To Obtain Petitioner's Consent Were Patent And Acknowledged.*

Petitioner's child was born on January 6, 1947. Thereafter petitioner returned to the home of Reverend and Mrs. Raymond Stanley Litsinger in Silver Spring, Maryland.

On March 4, 1947, she received (apparently from respondent's attorney) a form of consent to adoption pursuant to the requirements of Virginia law (R. 95).

Both Reverend and Mrs. Litsinger thereupon definitely urged petitioner to go through with the adoption (R. 21). However, they encountered a very marked reluctance on the part of petitioner to accede to their urging (R. 21).

Yet, both Reverend and Mrs. Litsinger persisted in their efforts "even to the point of a breach in near pleasant relations" (R. 21).

In his testimony (R. 21) Reverend Litsinger conceded that petitioner "was so reluctant to do it that she didn't want to do it". Reverend Litsinger even took the position that he "didn't feel that she (petitioner) was competent, at the time, to judge wisely of the future". (R. 21).

The Reverend Litsinger admitted that petitioner signed the consent "at the insistence of Mrs. Litsinger and himself" (R. 21, 22, 23, 24), and that petitioner "was reluctant in signing these papers" (R. 24).

Reverend Litsinger's further testimony disclosed that "it was definitely her (petitioner's) conviction that she did not want to sign the papers" (R. 24).

The reluctance of petitioner to sign the consent was exhibited, according to Reverend Litsinger, in her attitude of "sorrow, sadness and distress" (R. 28).

The origin and degree of the pressure to which petitioner was subjected to bring about her execution of the consent paper is revealed in the following excerpt from Reverend Litsinger's testimony—

. . . . .

"Q. Mr. Litsinger, then do you state that the matter of this adoption was really instigated by you and Mrs. Litsinger?

"A. Definitely; yes.

"Q. And that you and she used your influence on her and your best offices to carry it through?

"A. To our very best judgment."

. . . . .

It is evident, further, that one of the promises held out to petitioner by Reverend Litsinger as an inducement to the execution of the consent was the firm assurance that petitioner would later be permitted by the adoptive parents to "see and visit with her child" (R. 25, 26). This promise

never was fulfilled and petitioner was denied the right to see the child by the adoptive parents (R. 212, 242).

The testimony of Mrs. Blanche Walker Litsinger, wife of Reverend Litsinger, substantially corroborates the contention that the alleged consent to adoption obtained from petitioner on March 18, 1947, resulted from duress. The opposition of petitioner to signing the consent is well portrayed in the following extract therefrom—

. . . . .

“Q. What was her attitude in regards to the signing of that paper immediately before and at the time of the signing?

“A. *She didn't want to sign it.*

“Q. Did you and Mr. Litsinger attempt to persuade her to sign it?

“A. Yes, we did, because we felt that if she would sign the paper everything would straighten itself out and then she could go on and maybe lead another life, but I guess she was very definite about that. I don't think we realized how deeply the baby had taken root in her life.

“Q. What has been the effect since the signing of the last paper on her; has she become reconciled or more and more an intent upon her to have the baby back?

“A. Oh, no. Not reconciled at all. It has grown on her more and more that she must have her own child.

“Q. *Do I understand that you take the position that you feel that you and Mr. Litsinger have influenced her to sign this agreement?*

“A. Yes, I do.” (R. 57) (Italics supplied.)

. . . . .

and again by Mrs. Litsinger's admission—

“\* \* \* but I feel in all honesty that we had a great deal to do with her signing both papers” (R. 60).

. . . . .



The constant pressure to which petitioner was subjected by the older Litsingers is seen in the response by Mrs. Litsinger to a question which asked her to summarize her position and action in the premises:

• • • • •  
 "Q. I want to ask you this final question:

"In looking back over the signing of these two papers, is it your honest conviction that Miss Allen would have signed these papers on her own volition, or did she sign these papers by your advice and under the persuasion of you and Mrs. Litsinger?

"A. Yes; I know that we advised her at all times, *and persuaded her to sign them.* We gave her that advice. (*Italics supplied.*)

*2. Petitioner Strongly Resisted Execution of the Consent to Adoption and Signed only under Compulsion.*

Although the statutory form of consent reached petitioner at the Litsinger home on March 4, 1947, she did not sign the paper until March 18, 1947 (R. 95).

During that fourteen or fifteen day period petitioner, distressed by the loss of her baby, was assailed by the unrelenting insistence of Reverend and Mrs. Litsinger that she sign the consent.

• • • • •  
 "Q. Was it only signed then at the urging and insistence of Mr. and Mrs. Litsinger.

"A. I was in such a condition I had to do something; it was either to live there with them telling me I was ungrateful for what they had done for me after they had treated me like their own child, to think I would do this to them. Mrs. Litsinger said, 'You promised me so many times you would not take the child back.'

"The Court: When was that?

"A. (Continued) But you know what type of argument went on. I said 'I won't sign'. They would leave me alone a few days and something would come

up to bring up the subject. At that time I was in such a state of mind, with so much pressure, I couldn't stand it any longer" (R. 95).

So rigorous was this pressure that petitioner feared for her sanity—

"Q. Despite the persuasion or the influence being brought to bear on you at that time would you or would you not have signed this consent agreement unless you felt you would have an additional opportunity to be heard by virtue of this inquest?

"A. I thought I would. The Litsingers were bringing so much pressure on me I felt I was losing my mind and thought if I could relieve that situation any way in this next step I would take I could express myself in that definitely and tell why I was not willing to give my baby up" (R. 100).

"I was coming to the point that I felt I would lose my mind; pressure was too great. I felt I would either lose my mind or do something about it. So, I told Mr. Litsinger, 'I will sign this paper but I will not say that I am satisfied with this'" (R. 125).

and, finally, on March 18, 1942, capitulated to the strong entreaties of the Reverend and Mrs. Litsinger and signed the consent—

"\* \* \* After hours of discussion I said, 'Mrs. Litsinger, if you will take me down, I will sign, but I am not satisfied with it.'" (R. 96).

Petitioner was convinced that she signed the consent under compulsion:

"Q. Is that your signature to it?

"A. I have told you previously that under the conditions I said I was forced into something" (R. 129).

. . . . .

and that the performance of this act was motivated, in part, by the apprehension that she would be cast out of the Litsinger home—

"Q. You could have at least told them that you wanted to have your baby and that you—

"A. And have them kick me out on the street.

"Q. Did they say anything about that?

"A. I was practically thrown out after I said anything then.

"Q. Did they ever say anything about kicking you out on the street?

"A. They said they wouldn't have let me stay there" (R. 124).

### *3. There is a serious Question Concerning Petitioner's Mental Capacity at the time the Consent was Signed.*

At the delivery of her baby on January 6, 1947, petitioner was attended by Dr. Herman Diamant. Mr. Diamant in 1940 succeeded to the practice of Dr. Vernon Litsinger, father of respondent, William Stanley Litsinger, and brother of Reverend Litsinger (R. 43). His professional services were solicited by Mrs. Blanche Litsinger.

In his testimony Dr. Diamant stated that there occurs an emotional upheaval with any mother at childbirth and that such condition would be increased or aggravated by conditions present in this case (R. 13).

Some weeks after the baby was born, and prior to the giving of the alleged consent of March 18, 1947, petitioner was examined by Dr. Diamant at his office (R. 97). Dr. Diamant apparently felt that petitioner was suffering from

a mental disturbance for he recommended that petitioner consult a psychiatrist (R. 48, 97).

In February, 1948, petitioner was examined by Dr. Claude L. Neale, a Richmond psychiatrist. Dr. Neale's expert opinion in the premises is summarized in the below extract from his testimony—

“As a result of examinations, detailed history and my interview with Miss Allen, plus the result of psychological tests, it was my impression that Miss Allen was so emotionally upset or disturbed during the time when arrangements were being made for the adoption of her child that she was abnormally suggestible, and her judgment was impaired”. (R. 164)

The foregoing conclusion was asseverated by Dr. Neale in response to a question put by the court in regard to the mental soundness of petitioner—

. . . . .

“Q. Do you mean to say in your opinion, from what you know of her history that in March, 1947, she was mentally competent to transact ordinary affairs in life?

“A. No; my opinion is she was so emotionally upset her judgment was impaired.” (R. 173.)

This psychiatric evaluation of petitioner's mental condition at the time the consent of March 18, 1947 was obtained, is supported by the lay observation of Reverend Litsinger to the effect that petitioner was mentally and emotionally upset and distressed at that time (R. 32).

The foregoing expressions of opinion may be integrated with petitioner's statement that so much pressure was being brought upon her by the Litsingers that she thought she was losing her mind (R. 100).

It is evident that at the time she was brought to sign the consent of March 18 petitioner was in a precarious

state of mental imbalance, if not then actually suffering from a temporary psychosis.

4. *The Consent of The Natural Mother of an Illegitimate Child to an Adoption is Required under the Law of Virginia.*

By statute in Virginia the consent of the mother is required to validate the adoption by others of a child born out of wedlock. Such consent must be in writing, signed, and acknowledged. Appendix, *infra*.

The necessity for the mother's consent is consistent with general principles of American law appertaining to adoption—

“Ordinarily, under the adoption statutes, the adoption of an illegitimate child requires the consent of the Mother only; \* \* \*<sup>2</sup>

“The mother of an illegitimate child has all the parental rights of other parents as she it is whose consent to an adoption of the child is required, \* \* \*<sup>3</sup>

“In America the doctrine prevails that the Mother of an illegitimate child is entitled to its custody.”<sup>4</sup>

and this has long been the law in England—

“But the rule in the cases of illegitimate children is well settled by the courts in this country . . . The Mother, here is entitled to the custody of her bastard child; \* \* \*.”<sup>5</sup>

<sup>2</sup> 2 C. J. S. 387.

<sup>3</sup> 1 Am. Jur. 639, 640..

<sup>4</sup> “*Treatise on the Law Relating to the Custody of Infants*,” Lewis Hochheimer (1887), p. 196.

<sup>5</sup> “*Commentaries on the Law of Infancy*,” R. H. Tyler, 2nd Ed. (1882), p. 288.

"It is not unlikely, indeed that by granting this application, we may be doing a great prejudice to the child but still the Mother is entitled to the child if she insists upon it."<sup>6</sup>

and today is comprehended as a requirement of the present day British adoption statute.<sup>7</sup>

Similarly, the Canadian Courts have given affirmation to this principle. In the 1941 case of *X v. Y.*<sup>8</sup> a petition for the adoption of a three year old child was refused when the mother of the child did not consent to the adoption. The Supreme Court of Quebec therein based its denial of adoption in part on that reason.

The necessity of parental consent to an adoption is one accorded general recognition through the various States—

"Upon adoption of a child the relationship between the child and its own parents is severed. The State legislatures, therefore, emphasize the equity and necessity of obtaining the consent of the parents to the adoption of the child. • • •"

It is generally understood that the consent of the natural parents, who have done nothing to forfeit their right to the control and custody of the child, to the adoption is essential, and an act of adoption without the required consent is null and void and without effect,<sup>10</sup> and there is authority to the effect that the requisite of consent is not nullified by the mere fact that the natural parents may be unfit.<sup>11</sup>

<sup>6</sup> *Ex parte Knee*, 1 Bos. & Pull. N.R. 148.

<sup>7</sup> "Adoption of Children Act," 16 and 17 George V, c. 29;

"No adoption order may be made without the consent of every person or body who is a parent or guardian of the infant. • • •" *Halsbury's Laws of England*, 1935, Vol. 17, p. 682.

<sup>8</sup> 79 Que S. Ct. 587.

<sup>9</sup> "A Summary of Legislation on Adoption," Carl A. Heisterman, in "The Social Service Review," Vol. IX, No. 2, June 1935, p. 277.

<sup>10</sup> 2 C.J.S. 383.

<sup>11</sup> *ibid.*



5. *Consent to any Legal Transaction or Act must be Voluntary to be Valid.*

Consent has been defined to be—

“Agreement of mind; concurrence of wills; approval.<sup>12</sup>

• • • • •  
“Concurrence of Wills.”<sup>13</sup>

The theory of the law in regard to acts done and contracts made by the parties, affecting their rights, is that in all cases there must be a free and full consent to bind the parties. Consent is an act of the reason accompanied with deliberation. Hence, if consent is obtained by meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.<sup>14</sup>

Consent in law is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake.<sup>15</sup> Consent, moreover, implies, at least, the power of preventing. It means not merely that a person accedes to, but authorizes, an act.<sup>16</sup>

<sup>12</sup> *Anderson's Dictionary of Law*, p. 230.

<sup>13</sup> *Black's Law Dictionary* (2d Ed.), p. 249; *Bouvier's Law Dictionary* (1897), p. 400.

<sup>14</sup> 1 *Story, Equity*, Sects. 222-223.

<sup>15</sup> *Butler v. Collins*, 12 Cal. 457, 463.

<sup>16</sup> *Cowen v. Paddock*, 17 N.Y. Supp. 387. The facts and opinion of the court in the recent English case of *In re Hollyman*, 172 L.T.R. 200 (1945), disclose the identical British rule: “The short facts are as follows: The mother signed a form of consent which was exhibited to the affidavit in support of the petition. When the case came on for hearing she opposed the application, saying in the first place *that the consent had been improperly obtained from her*. On that the learned county court judge decided against her, but she remained throughout objecting to the making of the order; in other words the written consent which she had given she resiled from and decided that she no longer was agreeing to the order which was asked for. That was the position before the county court judge, but he disregarded her opposition, relied on the written consent exhibited to the affidavit and made the order. In my opinion the order cannot possibly stand • • •” (italics supplied).

There is no question but that petitioner performed the mechanical and physical act of signing, on March 18, 1947, the statutory consent form presented to her (R. 125).

Neither is there any question but that petitioner's signature thereto was procured by the strongest and most unrelenting type of mental coercion and compulsion.

The consent paper of March 18 arrived at Reverend Litsinger's home on March 4, 1947. Significantly, it was not signed until March 18 (R. 125). By the uncontradicted testimony of three witnesses it was conclusively shown that petitioner did not want to sign this paper (R. 21, 22, 24, 29, 57). The uncontradicted testimony of at least four witnesses manifestly showed that great pressure was brought to bear on the petitioner to effect that purpose. Reverend Litsinger testified that petitioner did not want to sign the paper and was so reluctant to do so that he urged her, "Even to the point of a breach in near pleasant relations", to sign the paper. "I even went to the point of saying that I didn't feel that she was competent, at that time, to judge wisely of the future" (R. 21). Reverend Litsinger stated unqualifiedly that petitioner undoubtedly executed these papers because of the advice and insistence on the part of himself and Mrs. Litsinger (R. 24).

When asked if the agreement signed on March 18, 1947, was done so largely at the insistence of himself and Mrs. Litsinger, Reverend Litsinger acknowledged: "Definitely, I don't think there is any question about that" (R. 22).

In a letter from Reverend Litsinger to Mr. Gordon Lewis, attorney for respondents, appears this phrase: "I am trying to push things through at this end, but do not appear to be meeting with any immediate success" (R. 32).

On page 34 of the transcript Reverend Litsinger said petitioner was in so much distress that he felt the only thing to do was to let her work out her own problem in so far as

possible, but whenever the opportunity presented itself he urged her to go ahead and clear the matter up. When he found she felt so keenly about it—then he just waited.

Mrs. Litsinger said petitioner did not want to sign the agreement and that she and Reverend Litsinger had "A great deal to do with her signing those papers" (R. 61).

Respondent Elizabeth Litsinger testified: "They (meaning, Reverend and Mrs. Litsinger) were pushing things at that end——" (R. 225).

Respondent William Stanley Litsinger testified to the effect that he presumed Reverend Litsinger was working in his interest all the time (R. 240).

Reverend Litsinger, as a means of inducing petitioner to sign, repeatedly assured petitioner that there was no reason in the world why she couldn't go down to Tappahannock and see her baby after the adoption (R. 24, 26). Reverend Litsinger then testified to the effect that petitioner "Must have had it in mind" when she signed the agreement of March 18, 1947 (R. 26).

Petitioner testified to the effect that so much pressure was being brought on her that she couldn't stand it any longer (R. 96, 100), and that she felt she was losing her mind. She thought that if she could relieve that situation in any way, knowing that she would soon be out of the home and influence of Reverend and Mrs. Litsinger, she would have an opportunity definitely to tell why she was not willing to give up her baby (R. 100, 101).

Thus the record, in stark fashion, overwhelmingly shows that petitioner's alleged consent of March 18, 1947 was not her free, volitional and independent act.

There flows from this consequence the inescapable conclusion that the alleged consent of petitioner executed on March 18, 1947, was, in fact, no consent at all but, instead, a nullity.

## II

The alleged "consent" obtained by respondents from petitioner to authorize respondent's adoption of petitioner's child was withdrawn by petitioner before entry by the Circuit Court of Essex County of a final decree of adoption. Hence, petitioner's consent to the decree was non-existent at the time the final decree of adoption was entered.

*1. Petitioner's Timely Motion to Revoke the Interlocutory Order of Adoption Represented an Affirmative Withdrawal of Consent to the Adoption.*

We have seen that on March 18, 1947, petitioner executed a paper in the form of the statutory consent to adoption required under the law of Virginia. *Appendix, infra.*

Petitioner contends that such consent was abortive and not a true and actual expression of her intent, will, purpose and desire at that time.

Furthermore, petitioner respectfully points out that, notwithstanding the void and invalid nature of such consent, she nevertheless took steps to revoke her action of March 18, 1947, prior to the entry of a final decree of adoption.

On May 7, 1947, the notarized consent of March 18, 1947, was filed by respondents with the Circuit Court of Essex County in compliance with statutory provisions of the laws of Virginia.<sup>17</sup>

On the same day that court entered an interlocutory order of adoption (R. 6-7) authorizing the residence of petitioner's child with respondents *for a period of one year* and sanctioning the change of his name to "William Stanley Litsinger, Jr." (Italics supplied).

---

<sup>17</sup> 1948 Cum. Supp. to the Va. Code of 1942, Annotated (Michie), Sect. 5333(d).

Petitioner, on February 21, 1948, during the pendency of the one year interlocutory order and nearly four months before entry of a final decree of adoption, gave notice of her intention to ask the court <sup>18</sup> to revoke her colorable consent theretofore given under duress and to award her the custody of her child.

Coincident with the presentation of this notice petitioner filed her petition with the court praying the revocation of the interlocutory order and the entry of an order delivering custody of her child to her (R. 8). The essential portion of that petition prayed—

“(1) That she is the natural mother of the child known in these proceedings as “Baby Allen”, which is a male child, born to her on January 6, 1947;

“(2) At the time she gave her consent for the adoption of said child, she was neither mentally nor physically competent to make such a momentous decision but did so upon the advice of others imprudently given and hence the decision was not in reality that of this petitioner, and did not represent her considered judgment or desire; \* \* \*

It is apparent from the foregoing relation that petitioner by February 21, 1948, affirmatively and within the allowable statutory time had withdrawn the alleged consent of March 18, 1947, irrespective of the invalidity of that consent.

*2. A Natural Parent May Withdraw Consent to Adoption During the Pendency of an Interlocutory Decree of Adoption.*

This action by petitioner posits a question concerning the effect of such withdrawal or revocation.

It would seem to be a rule of general acceptance that consent may be withdrawn at any time before adoption,

<sup>18</sup> i. e., the Circuit Court of Essex County, Virginia.

even though given in writing, and accompanied by transfer of the custody of the child, and even though the natural parent had abandoned the child. An adoption based upon a consent that has been withdrawn, moreover, is void.<sup>19</sup>

In *State ex rel. Towne et al. v. Superior Court for Kitsay Co. et al.*,<sup>20</sup> the court held that an unwed mother had the legal right and power to revoke consent to adoption which she had given, even though the adoption proceedings were pending.

Similarly, in *Wright v. Fitzgibbons*<sup>21</sup> when the mother of a minor child appeared and objected to adoption of the child by another, her consent to the adoption previously given was held ineffective.

The purpose of a probationary period under an interlocutory decree was well stated by a New York court in the case of *In re Burke's Adoption*.<sup>22</sup> In that case a mother voluntarily surrendered her child, signed an adoption agreement and in person executed consent before the surrogate who was satisfied that her decision to consent to the adoption was the result of mature, deliberate and considered judgment. Under Sec. 112, Sub. 7 of the Domestic Relations Law of N. Y., a surrogate in his discretion may dispense with the usual six months probationary period and enter a final order, which this surrogate did. After the entry of the final order, but within six months period, the mother attempted to withdraw her consent. The court on appeal permitted this mother to withdraw her consent, holding that

---

<sup>19</sup> 2 C. J. S. 386, citing with approval; *In re Sunada*, 31 Hawaii 328; *In re Anderson*, 248 N. W. 657; 189 Minn. 85; *State v. Beardley*, 183 N.W. 956; 149 Minn. 435; *Andrew's Adoption*, 14 Pa. Dist. & Co. 343; *Hebhardt v. Anderson*, 7 Pa. Dist. Co. 139; *In re Nelms*, 279 P. 748, 153 Wash. 242.

<sup>20</sup> 165 P. (2) 862 (Wash. 1946).

<sup>21</sup> 21 So. (2) 709 (Miss. 1945).

<sup>22</sup> 60 N.Y.S. (2) 421 (1946).

the surrogate had abused his discretion in dispensing with the usual probationary period, said probationary period being for the protection and benefit of all parties to the adoption, natural parents included, and "any time during such period a natural parent may withdraw the consent and thus nullify the proceeding."

The same result was achieved the previous year in another New York case.<sup>23</sup> The facts therein were that the Surrogate's Court, in its discretion, dispensed with the usual probationary period and entered a final order of adoption. Thereafter the mother attempted to withdraw her consent, and the Court permitted her to do so, setting aside the final order of adoption and saying it was an abuse of discretion by the Surrogate's Court to dispense with the probationary period. *The Court expressly refuted a statutory construction that the probationary period was not intended for the benefit of the mother of the child.* "It was in our opinion, intended for the benefit of all parties" (Italics supplied).

The majority rule apparently favors the right of a mother to revoke her consent to adoption even where such consent was entirely voluntary and executed in manner consistent with the statutory requirements. In the case of *In re White's Adoption*<sup>24</sup> proper consent was made, and no question was raised as to the regularity or legality of the original proceedings for adoption. The adoption failed when the mother *without stating any reasons withdrew her consent* before the entry of the final order. The Court held that *it was not necessary to state any reason "beyond the mere fact she had changed her mind,"* stating that "neither the lack of proof of fraud or undue influence nor the respective advantages in favor of or against the adoption is con-

<sup>23</sup> *In re Bruce*, 53 N.Y.S. (2) 502 (1945).

<sup>24</sup> 1 N.W. (2) 579, 300 Mich. 378, 138 A.L.R. 1034 (Mich.), Jan. 6, 1942.



trolling; \* \* \* " and *that the natural mother had the right to withdraw her consent to the adoption during the ninety days while the probate court still had control over the matter*, and after the withdrawal of consent there was no longer the legal consent necessary to a further order confirming adoption. (Italics supplied.)

The American rule on the subject finds support in the comparable English decision handed down sixty some years ago in the case of *The Queen v. Nash*, (1883), 10 Q. B. D. 454. The facts in that case were that Rose Carey, a girl not quite fifteen years of age, was seduced in 1875, and was shortly afterwards turned out of her father's house. She was delivered of female child on the 14th of May, 1876. Shortly after the infant's birth the mother placed it in the custody of Emma Nash, the wife of William Nash, a labouring man. She then obtained a situation but fell into ill health and went to an infirmary. After leaving the infirmary she became mistress to a gentleman. In December, 1882, the natural mother applied for a writ of *habeas corpus* to bring up the child that it might be delivered to her, but the application was refused. The mother then appealed to a divisional court which on the 5th day of February, 1883, reversed the decision and ordered that the *habeas corpus* should issue. Nash and his wife appealed. The opinions of the justices are of interest—

*Jessel, M. R.* "The appellants have not a particle of right to the custody of the child, and they set up the case that the child's natural mother is no relation to it, and has no more claim to its custody than any stranger. In many cases the law recognized the right of a mother to the custody of her illegitimate child. \* \* \* The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child."



*Lindley, L. J.* "I am of the same opinion. We cannot interfere with the right of the mother in favor of persons who are mere strangers. \* \* \* The right of the mother as against the appellants is to my mind clear."

*Bowen, L. J.* "I believe that the appellants are acting with a view to the benefit of the child, but philanthropy sometimes makes mistakes."

The possibility of estoppel rising to bar a revocation of consent is discussed in the case of the *Adoption of Capparelli*.<sup>25</sup> In reference thereto the Supreme Court of Oregon declared—

"A text-writer has suggested that some of the more recent decisions have shown a tendency on the part of the courts to deny the right of a parent to withdraw consent to adoption before the final decree, if the consent was given voluntarily with a full understanding of every fact necessary thereto. \* \* \* It will be seen, however, from a study of the cases cited in support of the text, that the rule, under which a parent is permitted to withdraw consent before final decree, has not been departed from, but rather that in the cases cited matters of equitable estoppel were invoked against the parent \* \* \*"

But in *Green v. Paul*<sup>26</sup> a Louisiana court discounted the barrier to revocation on the basis of estoppel, saying—

"\* \* \* disallowance of the right to withdraw consent on the basis of estoppel would be tantamount to an approval of adoption where the consent is actually lacking, a result contrary to the intention of the law."

---

<sup>25</sup> 175 P. (12) 153 Ore (1946).

<sup>26</sup> 31 So. (2) 819 (La., 1947).

*3. Consent of a Natural Parent to an Adoption Must be Operative at the Time of Entry of a Final Decree of Adoption.*

The rule in the great majority of the jurisdictions wherein the question has arisen is that a natural parent's consent to the proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to an adoption, may be effectively withdrawn or revoked by the natural parent before the adoption has been finally approved and decreed by the court.<sup>27</sup>

In a leading Louisiana case the rule was enunciated in this language:

"Therefore, since consent is essential it would seem to follow that it must be of a continuing nature and that withdrawal of consent prior to the rendition of a final decree is just as effective a bar to the adoption as though the consent had never been given."<sup>28</sup>

The soundness of the view that a natural parent may withdraw consent to adoption during the operative period of an interlocutory decree is implemented by good authority that, in some cases, consent may be revoked even after the entry of a final decree of adoption:

"It is observed that under the view noted above, that a natural parent's consent to a proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to an adoption may be effectively withdrawn or revoked by the natural parents before the adoption decree becomes final, it has been held that such consent may, where the circumstances otherwise warrant, effectively be withdrawn after the entry of the decree, but within the period allowed for appealing from a judgment of adoption.

<sup>27</sup> 1 Am. Jur., "Adoption," Sect. 37.1.

<sup>28</sup> *Green v. Paul*, *supra*, at n. 26.

(*Skaggs v. Gannon*, (1943), 293 Ky. 795, 170 S. W. (2d) 12), or after the order confirming the adoption has been made, but prior to the expiration of the time for filing a petition for a rehearing, at least where there are no intervening vested rights of the adopting parents or the child. *In Re White* (1942), 300 Mich, 378, 1 N. W. 2nd, 579, 138 A. L. R. 1034." <sup>20</sup>

Where, as in the present case, not only is the alleged consent affirmatively recalled by the natural mother prior to entry of a final decree of adoption, but such consent is intrinsically defective in character, petitioner's position would seem to be unassailable.

In *Skaggs v. Gannon*,<sup>30</sup> the mother of the child agreed by contract to have the child adopted and relinquished custody, accompanying assurance that she would receive notice of adoption proceedings to which she secretly planned to object, and when she was not notified the court held that this was sufficient reason for the mother to withdraw her consent previously given prior to final judgment. The mother in this case was an unwed mother.

Again in *Hammond v. Chadwick*,<sup>31</sup> an instrument was executed evidencing freely executed consent on the part of the mother, but at the time she executed the instrument she was actually laboring under a great mental strain and in fear that if she kept the child it would result in unhappiness to her family and cause a separation between herself and her husband, which condition was contributed to in a large degree by representations made by Mrs. Chadwick. The mother testified that she believed and relied upon these said representations at the time she executed the instrument. She further testified that she never did voluntarily and of her own free will give her child away; that at the time

<sup>20</sup> 2 A.L.R. (2) 892, n. 13.

<sup>30</sup> 170 S.W. (2) 12 (Ky., 1943).

<sup>31</sup> 199 S.W. (2) 547 (Texas, 1946).

she seemed to think it was best, but she was so torn up she didn't know what to do. In a jurisdiction which supposedly requires cause for the withdrawal of consent, this mother was permitted to withdraw her consent and regain her child, as the mother claimed she believed and relied upon said representations.

Even in the *Adoption of Capparelli*,<sup>32</sup> the consent of the mother of an illegitimate child, given from her hospital bed within a few days after the birth of the child, was not regarded as final and the mother was permitted to effectively withdraw her consent before final action of the Court upon the petition for adoption, she not being charged with lack of diligence and the Court finding no grounds of estoppel against her.

The British law on the point affords an interesting and convincing parallel—

“Before making an adoption order the court must be satisfied (1) that every person whose consent is necessary and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights; \* \* \*”<sup>33</sup>

In the 1945 case of *In re Hollyman*<sup>34</sup> the Court of Appeals declared—

“That consent (to the adoption order) must \* \* \* exist at the moment when the order is made. \* \* \* The depriving of a parent of all parental rights is, of course, a serious matter, and one upon which a parent may very well feel one thing at one moment and another thing at another.”

<sup>32</sup> *supra*, at n. 25.

<sup>33</sup> *Halsbury's "Laws of England,"* 1935, Vol. 17, p. 683.

<sup>34</sup> *supra*, at n. 16.

and, in reversing a county court decision emphasized that—

“The consent must be operative at the time when the order is made. Thus County Court Rules cannot preclude a consenting parent from withdrawing consent down to the moment when the adoption is made.”<sup>35</sup>

The English rule laid down in the cited case may be generalized in the following language:

“An interim order does not have the effect of an adoption order.”<sup>36</sup>

There can be little dispute that the overwhelming weight of authority is to the effect that the natural mother can withdraw her consent at any time before the adoption proceedings are final. The vast majority of the cases hold that the natural mother can effectively withdraw her consent without reason or cause; the few holdings to the contrary upon analysis appear to be founded either upon an interpretation of the provisions of the particular state statute involved or upon an equitable estoppel (which has no application here) or upon the combined circumstances of equitable estoppel and consideration of the welfare of the child, as was so aptly pointed out in two late decisions.<sup>37</sup>

In fact, the preponderance of the jurisprudence is that *a continuing consent of the natural parent is vital to the validity of the adoption decree.* (Italics supplied). See *Application of Graham*, Mo. App., 1946, 199 S. W. (2d) 68; *In re McDonnell's Adoption*, Cal. App. 1947, 176 P. 2d 778; *State ex rel Platzer v. Beardsley*, 1921, 149 Minn. 435, 183 N. W. 956; *In re Anderson*, 1933, 189 Minn. 85, 248 N. W. 657; *In re Nelms* (1929), 153 Wash. 242, 279

<sup>35</sup> *supra*.

<sup>36</sup> *Halsbury, op. cit. supra*, p. 684.

<sup>37</sup> *Green v. Paul, supra* at n. 26; *Adoption of Caparelli, supra* at n. 25.

P. 748; *In re White's Adoption*, *supra*, at n. 24; *Wright v. Fitzgibbons*, 1945, 198 Misc. 471, 21 So. 2d 709; *Green v. Paul*, *supra* at n. 26.

It is respectfully submitted that this point is well taken and that the court erred in holding that the consent given could not be withdrawn on petition by the natural mother, your petitioner, prior to the time for entry of the final decree of adoption.

#### 4. *Statutes Governing Adoption Are in Derogation of the Common Law and Should Be Strictly Construed.*

Since the power of the court in adoption proceedings to deprive a parent of his child is in derogation of his natural right to it and is a special power conferred by the statute, such statute must be strictly construed.<sup>38</sup>

The right of adoption formed no part of the ancient law of England. An early text illustrates the then existing ban on separating natural parents from their children—

"If a Father is a Freeman of *London* he cannot devise the disposition of the Body of the infant, and if he *do*, yet the Infant shall remain in the custody of the Mayor and Alderman." <sup>39</sup>

The controlling principle was expressed by a Washington State court in the below quoted language:

"Adoption was not known to the common law, and is a matter purely statutory. Courts have passed upon this question frequently, and have adhered with much strictness to this rule." <sup>40</sup>

<sup>38</sup> *Re Cozza*, 163 Cal. 514, 126 P. 161.

<sup>39</sup> "The Infants' Lawyer," London (1697), p. 233.

<sup>40</sup> *In re Nelms*, 279 P. 748 (Wash. 1929). In *Furgeson v. Jones*, 17 Ore 204, 217 (1889), the Supreme Court of Oregon declared:

"The permanent transfer of the natural rights of a parent was against the policy of the common law. The right of adoption, as

The maintenance of the natural rights of parents to the custody and care of their children is of vital interest to the State. Adoption is of civil law derivation, and was unknown to the common law. Adoption proceedings are the exercise of a power conferred by statute and have no other sanction. Such statute, being in derogation of the common law and of the parent's natural rights, must be strictly construed. *Non-She-Po v. Wa-Win Ta*, 37 Ore. 213, 62 P. 15, 82 Am. St. Rep. 749; *Long v. Dufut*, 58 Ore. 162, 112 P. 59; *Matter of Cozza*, *supra* at n. 38.

In applying the necessary rule of strict construction to the Virginia statute regulating adoption, the following two results assuredly should be accomplished in view of all the facts and circumstances:

1. *The alleged consent of petitioner to the adoption, executed on March 18, 1947, should be construed to be void because not voluntarily given.*

2. *Petitioner's right to revoke the alleged consent of March 18, 1947, during the period of an interlocutory decree of adoption and before the entry of a final decree of adoption, should be recognized. (Italics supplied.)*

---

conferred by this statute, was unknown to it, and repugnant to its principles. Such right was of civil-law origin, and derived its sanction from its code. The right of adoption, then, being in derogation of common law, is a special power conferred by statutes, and the rule is, that such statutes must be strictly construed."

## III

In the patent and uncontradicted absence of petitioner's consent to adoption at the time the final decree of adoption was entered by the Circuit Court of Essex County, that court had no jurisdiction to enter such final decree of adoption.

*1. Consent of Petitioner to the Adoption was Essential to the Original Jurisdiction over the Subject Matter of the Circuit Court of Essex County.*

Petitioner strongly maintains that her alleged consent to the adoptive procedure herein, given on March 18, 1947, was obtained under duress and, therefore, was wholly void in contemplation of law.<sup>41</sup>

Examination of the authorities indicates that as a basic legal proposition the absence of consent to an adoption proceeding represents a jurisdictional defect—

“Consent is at the foundation of statutes of adoption, and, if they require it to be given and submitted, the jurisdiction of the subject cannot be acquired without it.”<sup>42</sup>

\* \* \* \* \*

“It seems clear that legal consent to an adoption actually does not exist where it is obtained through the fraud, duress, or other overreaching practices of the adopting parents or others, and that where it is to be obtained the jurisdictional prerequisite to a valid adoption is lacking. If considered as a jurisdictional defect, the decree would be open to a collateral, as well as a direct, attack.”<sup>43</sup>

\* \* \* \* \*

<sup>41</sup> *supra*, p. 12.

<sup>42</sup> 1 *Cyc. of Law and Procedure* 920.

<sup>43</sup> 2 *A.L.R.* 897.



"Where a decree or order of adoption is obtained by fraud practiced on the court, or by mistake of a material fact, it will be revoked."<sup>44</sup>

\* \* \* \* \*

The nexus between consent and jurisdiction in matters of adoption was judicially stated in the California case of *In re Sharon's Estate*—<sup>45</sup>

"Consent of the parties to an adoption, where required by the statute, is a jurisdictional fact and without it a valid order of adoption cannot be made; nor may an order of adoption void for want of consent, be validated by failure of the parties to object, or even by consent subsequently given, especially where property rights of others would be affected thereby."

This latter decision is consistent in its effect with the generic statement of the law on the point in *Corpus Juris Secundum*:

"An order of adoption which is void for want of jurisdiction cannot be validated and given force and effect by a curative act or a statute of limitations under which no portion of the limitation remains unexpired when the statute goes into effect."<sup>46</sup>

It would seem to be beyond controversy that the authorities recognize that consent to an adoption is not binding upon a natural parent where it was obtained through actual fraud or duress upon such party. This seems to be implicit in all of the cases upon the present subject.<sup>47</sup>

---

<sup>44</sup> 1 *Am. and Eng. Cyc. of Law* (2d Ed.), p. 736.

<sup>45</sup> 177 P. 283, 179 Cal. 447; see also *Truelove v. Parker*, 132 S. E. 295, 191 N. C. 430.

<sup>46</sup> 2 *C. J. S.* 367 (1948 *Cum. Ann. Pkt. Pt.*).

<sup>47</sup> 1 *Am. Jur.*, Sect. 37.1.

*2. Granting, by Hypothesis, that the Circuit Court of Essex County Initially had Assumed Jurisdiction Based on the Alleged Consent of March 8, 1947, Such Assumed Jurisdiction Was Vacated by the Timely Withdrawal of Consent by Petitioner on February 21, 1948.*

On February 21, 1948, before entry of a final decree of adoption by the Circuit Court of Essex County, petitioner filed a motion praying that court to revoke its interlocutory order of adoption on the ground, in substance, that petitioner had given no valid consent to the adoption.

That court, in an opinion devoid of citations of legal authority, refused to take cognizance of petitioner's action in withdrawing her consent (R. 286). The adoptive parents, who were residents of Essex County, were granted a final decree of adoption.

The Virginia Supreme Court of Appeals affirmed the decision in an opinion barren of any reference to the withdrawal of consent by petitioner or the jurisdictional question emerging therefrom (R. 291).

It is a generally accepted proposition that where the jurisdictional requirements of notice or consent have not been met, the proceedings are void and may be set aside. Accordingly, the order of adoption will be set aside or reopened where it is shown to have been procured without the consent of or notice to the child's parents. *Bell v. Krauss*, 146 P. 874, 169 Cal. 387, *In re Neuman*, 262 P. 1112, 88 Cal. App. 186, *In re De Leon*, 232 P. 738, 70 Cal. App. 1, *Almquist v. Garner*, 200 P. 76, 53 Cal. App. 305, *In re Brand's Estate*, 95 So. 603, 153 La. 195, *People v. Feser*, 186 N.Y.S. 443, *Johnson v. Johnson*, 264 P. 842, 124 Ore. 480, *In re McCann's Adoption*, 159 A. 334, 1014 Pa. Super. 196, *Symond's Adoption*, 44 Pa. Co. 209, *In re Knott*, 197 S.W. 1097, 138 Tenn. 349, *In re Force*, 193 P. 698, 113 Wash. 151.

Irrespective of the matter of the court's lack of jurisdiction it strongly is urged that petitioner was entitled to have the interlocutory decree vacated by reason of the duress employed to secure her alleged consent to the adoption:

"But aside from the question whether a fraudulently obtained consent is jurisdictional it may be said that the courts uniformly recognize that where a natural parent's consent to an adoption has been obtained through fraud, duress, mistake, etc., such parent is entitled to have the decree of adoption set aside on such grounds."<sup>48</sup>

However, the more logical view is that absence of consent denotes absence of jurisdiction:

"If he<sup>49</sup> appears and refuses to give such consent, there is then wanting what the statute specifically names as essential to authorize the court to make a decree, or judicially act in the premises. The reason is, that consent lies at the foundation of statutes of adoption, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject matter without it."<sup>50</sup>

On either ground, it unhesitatingly is submitted, petitioner is plainly entitled to have the final decree of adoption declared to be a nullity.

---

<sup>48</sup> 2 A.L.R. (2) 897.

<sup>49</sup> i. e., the natural parent.

<sup>50</sup> *Furgeson v. Jones*, *supra*, at n. 40. A father gave his child to others to adopt and rear, with a verbal promise that he would never ask that the child be returned to him. HELD, the father had the right to take the child back at any time. *Farrell v. Wilton*, (1893), 3 Terr. L.R. 232.

## IV

**The entry of a final decree of adoption by the Circuit Court of Essex County at a time when that court was without jurisdiction was a deprivation of due process of law within the contemplation of Amendment XIV to the Constitution of the United States.**

*1. Where There is no Jurisdiction in a Court the Constitutional Right to Due Process of Law is Abridged:*

Petitioner by sequential narration of the facts and application of the pertinent law thereto has endeavored heretofore to establish three premises. These propositions are:

*(A) That petitioner's alleged consent to the adoption, executed on March 18, 1947, was obtained under duress; and*

*(B) That petitioner affirmatively attempted to revoke such colorable consent as may have been given on March 17, 1947; and*

*(C) That, in either case, therefore, the Circuit Court of Essex County lacked jurisdiction over the subject matter of the adoption at the time its final decree therein was entered.*

Petitioner now asserts, that as a logical result of the foregoing, if, in fact, the Circuit Court of Essex County had no jurisdiction over the subject matter of the adoption, then petitioner was deprived of due process of law by the action of that court in entering a final order of adoption in this case.

It is axiomatic in constitutional law that a court must be vested with jurisdiction to proceed in a matter with propriety—

“The first requirement imposed by due process upon a court which assumes to determine the rights of

parties is that it have jurisdiction of the subject matter.”<sup>51</sup>

Accordingly, it is apparent that when a court has no jurisdiction of the subject matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, *notwithstanding he may have consented to its action*, either by voluntarily initiating the proceedings as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires all to move promptly who would take advantage of an irregularity does not apply here since this is not a mere irregular action, but a total want of power to act at all.<sup>52</sup> (*Italics supplied*).

There is copious authority to implement the foregoing reasoning:

“A court has jurisdiction of any subject matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceedings and judgment will be altogether void, and rights of property cannot be divested by them.”<sup>53</sup>

\*     \*     \*     \*     \*

“The law creates courts, and upon consideration of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.”<sup>54</sup>

\*     \*     \*     \*     \*

“Let us now consider what is due process in judicial proceedings. A prime requisite of due process is, of

<sup>51</sup> Rottshaeffer, “Constitutional Law,” p. 855.

<sup>52</sup> Cooley, “Constitutional Limitations” (8th Ed.), pp. 846, 847.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

course, that the court shall have jurisdiction of the subject matter.”<sup>55</sup>

\* \* \* \* \*

“There has never been any question that due process of law is denied when rights of person or property are attempted to be regulated by courts or other governmental agencies which have no jurisdiction of the parties or of the subject or of both.”<sup>56</sup>

\* \* \* \* \*

“In order to delimit personal liberty by exercising said control, the branch of the government undertaking to do so must have jurisdiction. If it does not have jurisdiction, it is taking personal liberty (life, liberty, or property) without due process of law. To this rule there are no exceptions. It cannot be waived. If a State undertakes to recognize interest or create rights, powers, privileges and immunities when it has no jurisdiction, its attempted exercise of power amounts to nothing. Personal liberty cannot be delimited at all without jurisdiction.”<sup>57</sup>

The necessity for the presence of the basic element of jurisdiction by a tribunal was unequivocally recognized by this court years ago in the leading case of *Pennoyer v. Neff*. This Court in that case finding that no jurisdiction existed in the court below, then said:

“Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings to determine the personal rights and obligations

---

<sup>55</sup> “*The Law of the American Constitution*,” Charles T. Burdick (1922), p. 516.

<sup>56</sup> III Willoughby, “*Constitutional Law of the United States*” (2d Ed.), p. 1709.

<sup>57</sup> Willis, “*Constitutional Law*” (1936), p. 676.

of parties over whom that court has no jurisdiction do not constitute due process of law.”<sup>58</sup>

and then enunciated the rule declaratory of the law today:

“To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; \* \* \*<sup>59</sup>

Petitioner recognizes that the facts which induced the conclusion of the Supreme Court in *Pennoyer v. Neff* vary from those in the present case. In *Pennoyer v. Neff* it was held that a personal judgment is without any validity if it be rendered by a State court in an action upon a money-demand against a non-resident of the State who was served by a publication of summons, but upon whom no personal service or process within the State was made and who did not appear to defend.

In the present case petitioner's child has been taken from her in the clear absence of valid consent to adoption, as required by Virginia law, and has been denied by the courts of Virginia the right to revoke the alleged consent to adoption which she asserts was procured under duress.

Petitioner respectfully points out that the gravamen of the court's decision in *Pennoyer v. Neff* was a lack of jurisdiction in the court which endeavored to enter a judgment adverse to *Pennoyer*.

In the matter at hand petitioner takes the position that she is entitled to have her child restored to her for the identical fundamental reason that the Court which deprived her infant similarly was without jurisdiction over the subject matter by virtue of the reasons hereinbefore set forth.

<sup>58</sup> *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565.

<sup>59</sup> *supra*, p. 733.

This Court subsequently, in *Scott v. McNeal*,<sup>60</sup> took the occasion to say that the proceedings and judgment of a court must be bottomed upon appropriate jurisdiction:

"No judgment of a court is due process of law, if rendered *without jurisdiction in the court*, or without notice to the party." (Italics supplied.)

A similar rule has been recognized by the State Courts. In *Sinquefield v. Valentine*<sup>61</sup> the Supreme Court of Mississippi held that before a parent can be deprived of the custody of his minor child there must be a hearing *before a court of competent jurisdiction* in which he has been served with process or entered an appearance, and no court has the right to deprive him of the custody or to judge him to be unfit for such custody without an opportunity for him to appear and to be heard. *The court said that to do so would be to deprive him of his legal rights without due process of law.* (Italics supplied.)

2. *There is Ample Precedent and Latitude Under and within which this Court may hold that Petitioner has been Denied Due Process of Law:*

The due process clause of the Fourteenth Amendment is no inflexible yardstick of iridium by which all deprivations of life, liberty and property by State action are exactly measured.

It is not fixed and crystallized in form or scope but *mutatis mutandi* bends within reasonable limits to serve its original purpose of furthering elementary civil justice by imposing inhibitions on unlawful State action—

"The limits of the jurisdiction conferred by the clause have not been established. Certainly they are

<sup>60</sup> 154 U. S. 34, 46.

<sup>61</sup> 159 Miss. 144, 132 So. 81.



intended to be and are of wide extent, and would seem to embrace the power to review, in an appropriate case, any substantial federal question which can arise in the courts of a State."<sup>62</sup>

Speaking of the due process clause of the Fourteenth Amendment the Supreme Court said in *Meyer v. Nebraska*:<sup>63</sup>

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men". (Italics supplied).

Petitioner, a helpless and distressed mother, now lays her case before this tribunal with the knowledge that this strong citadel of justice is her last legal refuge.

If her prayer here passes unheeded then must she spend the remainder of her days without the presence and companionship of her child.

The memory of her baby will, perforce, be limited to the moments of terror and anguish when consciousness came again to her after childbirth, and to the brief glimpses of him in the hospital room before respondents came to claim and bear away her infant.

---

<sup>62</sup> "Jurisdiction of the Supreme Court of the U. S.", Robertson and Kirkham, (1936) p. 28.

<sup>63</sup> 262 U. S. 390.

But petitioner is led to hope that adverse action of the Virginia courts will not by this Court pass unnoticed.

On numerous occasions in the past the Supreme Court has issued the writ of certiorari to inquire into claims that procedural due process has been denied by the State courts. *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 53 S. Ct. 330, 78 L. Ed. 674, *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, *Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 578, *Patterson v. Alabama*, 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082, *Hollins v. Oklahoma*, 295 U. S. 294, 55 S. Ct. 784, 79 L. Ed. 1500, *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682.

Nor is the Court bound by the interpretation of the Virginia courts in determining whether the rights of an individual have been taken away or disregarded without due process of law. In *Grannis v. Ordean*<sup>64</sup> the Court stated—

“But the question whether the process thus sanctioned by the court of last resort of the State constitutes due process of law within the meaning of the Fourteenth Amendment being properly presented to this court for decision, we must exercise an independent judgment upon it.”

Moreover on every writ of error or appeal, the first fundamental question is that of jurisdiction, first of this court, and then of the court from which the record came. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 425 S. Ct. 510, 511, 28 L. Ed. 462.

---

<sup>64</sup> 234 U. S. 385, 394, 58 L. Ed. 1639, 34 S. Ct. 783, citing *Ballard v. Hunter*, 209 U. S. 291, *Jacob v. Roberts*, 223 U. S. 261; accord, *Coombes v. Getz*, 285 U. S. 434, 441.

The power of the Court to conduct a separate and independent investigation based on the record to ascertain whether due process had been observed by State action was earlier made clear in the following language—

“Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States this court is no more bound by that court’s construction of a statute of the territory, or of the State, when the question is whether the statute provided the notice required to constitute due process of law, than when the question is whether the statutes created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute.”<sup>65</sup>

Thus it would seem that the Supreme Court is here presented with a case in which its jurisdiction is sharply defined and one with respect to which relief may be granted by a simple and valid extension of the sound jurisdictional doctrine laid down in *Pennoyer v. Neff*.<sup>66</sup>

---

<sup>65</sup> *Scott v. McNeal*, 154 U. S. 34, citing *Huntington v. Attrill*, 146 U. S. 657, 683, 684; *Mobile and Ohio Railroad v. Tennessee*, 153 U. S. 486, 492, 495.

<sup>66</sup> *supra*, at n. 58.

## V

**Procedural due process of law, within the comprehension of Amendment XIV to the United States Constitution, was violated by the Presiding Judge of the Circuit Court of Essex County when he willfully absented himself from the court room while important evidence was being presented.**

One of the witnesses called by petitioner at the hearing before the Circuit Court of Essex County on June 4, 1948, was Ruth Seldenright of the Child's Welfare Department of the Arlington Department of Public Welfare (R. 182).

In December of 1947 Miss Seldenright received a request from the Department of Welfare of Essex County, Virginia, to make inquiry concerning petitioner and to furnish all available information concerning the petitioner's occupation, financial condition, etc. (R. 184). Miss Seldenright arranged for an interview with petitioner and interrogated her concerning her background, education, and her views and wishes with respect to the proposed adoption of her child. Similarly, Miss Seldenright talked with petitioner's employer, Mr. Malcolm Devers of the Congressional School, Arlington, Virginia (R. 185), Mrs. Blanche Litsinger (R. 185), and a Mrs. Gilbert, the lady with whom petitioner was residing at the time (R. 187).

The results of the investigation conducted by Miss Seldenright were incorporated in a report written on April 12, 1948, and submitted to the Superintendent of Public Welfare of Essex County.

This report comprises a complete history of petitioner's childhood, education, teaching experience and other occupations. It comprehends, moreover, an account of the circumstances under which the petitioner gave her alleged "consent" to the adoption of her child by respondents and discloses the duress under which petitioner's consent to the adoption was obtained.

The report contains no recommendation but concludes with the following significant language:

"In conclusion in summary (sic), there would seem to be many factors favorable to Miss Allen's application, in particular her training and her work adjustment, and her sustained effort to regain the custody of her child."  
(R. 195)

This important report represented the result of the personal investigation made by the only welfare worker in the State of Virginia who contacted petitioner. It was read into the record as evidence. The report starts just below the middle of page 188 and terminates near the bottom of page 195 of the record.

Immediately before the reading of the report into evidence was begun the judge made the following statement:

"Go ahead and read it; I don't have to be here to hear it." (R. 188)

and then left the court room (R. 188) and did not return until after the conclusion of the reception into evidence of the report. (R. 195)

The effect of this untimely and unwarranted absence of the judge was that he did not hear, weigh, or evaluate any portion of this report representing the only official record of personal interview with petitioner on the part of the Public Welfare Department of Virginia. Under the Virginia statute of adoption, *Virginia Code of 1942, Annotated (Michie)*, sec. 5333(c), upon the filing of the petition for adoption the court wherein the petition was filed is required to forward a copy of the petition to the Commissioner of Public Welfare who shall cause to be made a thorough investigation of the matter and report thereon in writing to the court within sixty days. This investigation may be made by any welfare agency of the county or city within the State.

The purpose of the investigation by the welfare officials of the State, of course, was to acquaint the court with the pertinent facts and circumstances concerning the proposed adoption and thus enable the court to make a just decision based on all the facts at its disposal.

In the case at hand the court was precluded from making a proper assessment of these vital facts because the Judge chose to absent himself from the court while these facts were being received in evidence.

This defect possibly could have been cured had the Judge taken the opportunity to read the report before expressing his opinion on the merits of the case. But this did not occur. The opinion of the court was rendered immediately after the last witness left the witness stand (R. 283).

The further disinterest of the court in hearing the facts and evidence favoring petitioner is indicated by a statement of the court in reference thereto—

“You can put it in but this Court will not consider it” (R. 188).

It is apparent, therefore, that the deliberate absence of the Judge during the reception of important testimony grossly prejudiced petitioner's position during the trial and largely contributed to the ultimate decision adverse to her.

There can be no question of the acceptance of the general rule that procedural due process is violated when a trial judge leaves the bench and is away from the court room for a prolonged period of time during a trial or hearing—

“While judicial proceedings are going on the Judge must be personally on the bench, giving his attention to them; for judicial powers cannot be delegated.”<sup>66a</sup>

<sup>66a</sup> I. Bishop; *“Criminal Procedure”*, (2d Ed.), p. 267, citing *Stokes v. State*, 71 Ark. 112, 71 S.W. 248, *Williams v. State* (Tex.) 99 S.W. 1000.

*The American Law Institute Code of Criminal Procedure* (1931) codifies this principle in the below language—

“*Duty of the Court.* It shall be the duty of the court to control all proceedings during the trial • • •”<sup>67</sup>

The absence of the judge during final argument of a case is a fatal procedural (if not actually a substantive) defect. In *People v. Tupper*<sup>68</sup> a defendant convicted of a felony was held entitled to a new trial where it appeared that the judge absented himself from the court room for a period of twenty minutes during the argument of the case, and that during such absence he was out of sight and hearing of the proceedings going on in the court room.

“The argument of the case to the jury is as much a part of the trial as the introduction of evidence. And evidence may be introduced before the jury, in the absence of the Judge, if the practice here pursued may be held justified within the law. It is hardly necessary to present either argument or authority to show that neither of these practices can be justified. The Judge is a component part of the court. There can be no court without the Judge. And all that was ever done in the absence of the judge was in fact done in the absence of the court.”<sup>69</sup>

The absence of the judge for a considerable period of time during argument of the case constitutes a violation of the guaranty of due process of law.<sup>70</sup>

If the absence of a judge during final argument be a fla-

<sup>67</sup> Sect. 322.

<sup>68</sup> 122 Cal. 424.

<sup>69</sup> *supra*, p. 425.

<sup>70</sup> 16 C. J. S. 1185, 1186.

grant abuse of procedural due process, how immeasurably more serious is his absence during the reception of evidence:

"The absence of the judge during the progress of a trial cannot be sanctioned. . . . In fact there can be

no court without a judge and he cannot even temporarily relinquish control of the court or the conduct of the trial."<sup>71</sup>

\* \* \* \* \*

"If the Judge is absent while substantial proceedings, such as the taking of evidence or the argument of counsel, are being carried on in the presence of the trial jury, such proceedings must be regarded as *coram non judice*; \* \* \*"<sup>72</sup>

\* \* \* \* \*

It is plain from the foregoing relation that petitioner was denied procedural due process by the described misconduct of the judge.

Had the evidence been inconsequential something in extenuation might have been said. But the report of the welfare worker was vital. It included *inter alia* a disclosure that petitioner had withdrawn the consent upon which the very jurisdiction of the court depended. (Italics supplied.)

Petitioner urges that the absence of the judge from the court room during the hearing was a grave and reversible error.

### Conclusion

This presentation, it is submitted, represents a long chronicle of judicial abuse and error. It is a relation in which pathos and human suffering, though constituting no

<sup>71</sup> *State v. Benerman*, Sup. Ct. of Kansas (1898), 53 P. 874.

<sup>72</sup> *O'Brien v. The People*, 17 Cal. 561, 563, (1892).



ego factors for consideration by this Court, have a not insignificant part.

Petitioner, cast among strangers and suffering torment induced by her temporary weakness and indiscretion, signed a form of statutory consent to the adoption of her illegitimate child.

Copious evidence gleaned from the record attests to the fact that this consent was not voluntarily given but resulted from the exercise of the strongest compulsion. There is further evidence that petitioner was not fully of sound mind when, under compulsion she capitulated and signed the alleged consent.

Consent to any transaction obtained in such fashion is repugnant to fundamental principles of law. Consent so obtained is, in effect, no consent at all, but a legal nullity. This basic fact the Virginia Supreme Court of Appeals should have recognized.

Notwithstanding the void character of such consent petitioner nevertheless took affirmative steps to withdraw her act of consent. By timely motion and appearance in the Circuit Court of Essex County she informed that court that her consent no longer existed.

Under the Virginia adoption statute the consent of the mother of an illegitimate child is a condition precedent to adoption. Petitioner has asserted that, lacking this essential element, the Circuit Court was without jurisdiction. Ample authority has been presented to confirm this contention.

Yet, the trial court, proceeding without jurisdiction, entered a final decree of adoption adverse to petitioner. Patently this act violated due process under the Fourteenth Amendment.

As a separate and independent ground for reversal petitioner has stated that the action of the judge of the Circuit Court of Essex County in absenting himself from the

Bench and the court room during the presentation of important evidence favorable to petitioner resulted in an infringement of petitioner's rights amounting to a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

Petitioner states that she is financially able to take and rear her child in a metropolitan area and extend to him the advantages of a good home and a full education. She now is being prevented from accomplishing these purposes by respondents unlawful custody of her child.

WHEREFORE, it is respectfully submitted that petitioner has been denied the right to and custody of her infant child in contravention of the law of the land.

CHARLES ORLANDO PRATT,  
JOHN ALVIN CROGHAN,  
*Attorneys for Petitioner.*

APRIL, 1949.

**APPENDIX**

The pertinent provisions of the Virginia statute relating to adoption are hereinafter set forth:

"Sec. 5333d. Parental consent, et cetera. No petition for adoption shall be granted by the court unless there be written consent thereto, signed and acknowledged before an officer authorized by law to take acknowledgments and filed with the petition, or, when consent is required to be given by the Commissioner, filed at any time before the granting of the petition. Such consent shall be signed and acknowledged by the child if fourteen years of age or older, and (1) by both parents if they are both living, or (2) by the living parent if one of the parents is dead, or (3) by the mother in the case of a child born out of wedlock; \* \* \*"  
*1948 Cum. Supp. to the Virginia Code of 1942, Annotated, (Michie) p. 391.*

(1697)